Supreme Court, U.S.
FILED

01 570 SEP 27 2001

No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ANDRE QUINN DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arthur R. Martinez
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QUESTIONS PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE?

II. DID THE DISTRICT COURT COMMIT PREJUDICIAL ERROR BY ENGAGING IN AN EX PARTE COMMUNICATION WITH A JUROR DURING TRIAL?

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No._____

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner, Andre Quinn Duke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 29, 2001.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at United States v. Andre Quinn Duke, 255 F.3d 656 (8th Cir. 2001) and is reprinted in the Appendix hereto, p. A-1, infra.

The Findings of Fact, Conclusions of Law, Order and Memorandum Denying Defendant's Motion for a New Trial of the United States District Court for the District of Minnesota (Donovan W. Frank, J.) has not been reported. It is reprinted in the Appendix hereto, p. A-7, infra.

JURISDICTION

On December 22, 1999, Petitioner Andre Quinn Duke was convicted under 18 U.S.C. Secs. 2 and 844(i) and 18 U.S.C. Sec. 371 for arson and conspiracy to commit arson. He was sentenced on May 31, 2000 by the Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

The United States Court of Appeals for the Eight Circuit affirmed in a published opinion filed June 29, 2001. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. Sec. 2

18 U.S.C. Sec. 844 (i)

18 U.S.C. Sec. 371

STATEMENT OF THE CASE

On July 13, 1999, Petitioner appeared in the United States District Court, District of Minnesota, for purpose of a First Appearance and Detention hearing in front of Magistrate Judge E. S. Sweringen. On July 13, 1999, Petitioner was arraigned on a Two Count Indictment at which time Petitioner plead not guilty to Counts 1 and 2. On July 29, 1999 motions were filed, and such motions were heard on August 11, 1999 before the Honorable Magistrate Judge Arthur J. Boylan.

On December 7, 1999, a jury trial against Petitioner and his brother/co-defendant Claude Duke Jr. was commenced before the Honorable Donovan W. Frank, United States District Court Judge. Petitioner was convicted on both counts on December 22, 1999. Co-defendant Claude Duke Jr. was acquitted of Count 1 -- aiding and abetting arson -- and was found guilty of Count 2 -- conspiracy to commit arson. The District Court subsequently granted Claude Duke Jr.'s motion for judgment of acquittal as to Count 2.

On April 13, 2000, Arthur R. Martinez replaced trial counsel Albert A. Garcia as counsel for Petitioner, and, on said date, counsel filed a motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial based on newly

discovered evidence, namely Claude Duke Jr.'s post-trial confession as to sole responsibility for the arson fire. The matter was heard on April 26, 2000, and, on May 1, 2000, Petitioner's motion for new trial was denied. On May 31, 2000 Petitioner was sentenced to 24 months to the Bureau of Prisons. Judgment was entered on June 27, 2000, and, on such date, Petitioner filed his Notice of Appeal.

Before the Eighth Circuit Court of Appeals, Petitioner challenged the District Court's denial of Petitioner's motion for a new trial on two grounds. First, Petitioner contended that the District Court erred in finding the post-trial statements of the co-defendant not credible. Second, Petitioner contended that the District Court erred in finding that the newly discovered evidence would not result in an acquittal at a new trial. Petitioner also alleged that the District Court committed prejudicial error by engaging in ex parte communication with a juror during trial.

In an opinion filed June 29, 2001, the Eighth Circuit affirmed the judgment of the District Court and the order denying a new trial.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

In denying Petitioner's motion for a new trial, the United States District Court adopted a stringent, unbending standard contrary to established law and in violation of Petitioner's due process rights. The Writ must be granted to preserve established precedent and to protect Petitioner's constitutional rights.

First, the District Court (and the Eighth Circuit) erred in ruling that the post-trial statements of Petitioner's co-defendant did not constitute "newly discovered evidence" under Rule 33 of the Federal Rules of Criminal Procedure. The lower courts made their rulings based upon their finding that Claude Duke Jr.'s statements were not credible.

However, the courts made this finding without any sworn testimony from the co-defendant. While evidentiary hearings are discretionary, U.S. v. Begnaud, 848 F.2d 111, 113 (8th Cir. 1988), at a minimum, Petitioner's due process rights require a proper evaluation of credibility of a witness. Id.; U.S. v. Fuente, 991 F.2d 1406 (8th Cir. 1993). The only way for the

district court to ascertain the credibility of a witness is by examining sworn testimony.

Second, the district court (and the Eighth Circuit) erred in ruling that the newly discovered evidence would not result in an acquittal at a new trial. Contrary to the findings of district court and the Eighth Circuit, Petitioner was convicted on little evidence, most of which was circumstantial. The lower courts failed to follow Eighth Circuit precedent which holds that, where the evidence supporting a defendant's conviction is weak, newly discovered evidence should lead to a new trial. See U.S. v. Liebo, 923 F.2d 1308 (8th Cir. 1991).

II. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR BY ENGAGING IN AN EX PARTE COMMUNICATION WITH A JUROR DURING TRIAL

Petitioner's constitutional right to a fair trial was prejudice by the trial court's impermissible ex parte communication with a juror. Communications between a judge and a juror, outside the presence of the defendant and his lawyer, are improper and presumptively prejudicial. U.S. v. York, 830 F.2d 885, 894-95 (8th Cir. 1987), cert denied, 484 U.S. 1074 (1988). The burden is on the government t establish

that the contact was harmless. Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L. Ed. 654 (1954). This prejudice to Petitioner was never overcome by the prosecution, and the record does not indicate whether the communication was "harmful or harmless." Remmer v. United States, 347 U.S. at 229-30.

Moreover, according to the record, Petitioner never waived his right to be present during the communication, and Petitioner believes this is in contravention of Rule 43 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the United States Constitution.

Petitioner contends his due process rights were violated, and this Court must consider this important question of federal law.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Dated: September 26, 2001

MARTINEZ & ANDRADE. LLC

Arthur R. Martinez
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(612) 333-6000

Attorney for Petitioner

United States Court of Appeals

For the Eighth Circuit

No. 00-2668

United States of America,	*	Appeal from the United
Plaintiff-Appellee,	*	States District Court for
v.	*	the District of
Andre Quinn Duke,	*	Minnesota
Defendant-Appellant.	*	

Submitted: May 15, 2001

Filed: June 29, 2001

Before LOKEN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Andre Duke was convinced of arson in violation of 18 U.S.C. §§ 2 and 844(i), and of conspiracy to commit arson, in violation of 18 U.S.C. § 371. He appeals his conviction and the denial by the district court[1] of his motion

---

[1] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

for a new trial based on newly discovered evidence. We affirm.

Andre Duke owned a bar in St. Paul, Minnesota named "Rocky's on 10th," and his brother Claude Duke managed the daily business. Rocky's was seriously damaged by a fire and explosion on May 24, 1993. A subsequent investigation revealed that the fire was a result of arson and that the arsonist had poured gasoline around inside the bar and then ignited it with open flame. The investigation also suggested that the fire had been set by someone with access to a door key and that the arsonist had tampered with the entrances to suggest a forced entry.

The Duke brothers were indicted by a federal grand jury in July 1999, on two counts of arson and conspiracy to commit arson. The government theory at trial was that Rocky's had been in dire financial straits and that the Dukes had committed arson in order to escape their losses and to collect insurance. The jury heard evidence that the brothers were months behind in payments to their suppliers and landlord and were in danger of eviction. Witnesses testified that the brothers had recently made unsuccessful efforts to sell Rocky's and that they had both expressed dissatisfaction with the business. The evidence also indicated that both

Dukes had falsely states to law enforcement and insurance investigators that business was good and that they were current on all their debts. The Dukes denied any involvement in the fire and attempted to implicate others, including former employees, competing bar owners, and gang members. Andre Duke testified that Rocky's was financially stable and that he had no motive to commit the arson. Claude Duke exercised his Fifth Amendment rights and did not testify at trial.

When alternate juror Catherine Larson became aware during trial that someone with whom she worked was a government witness, she informed the court. The witness she knew was Art McGrane, a former bartender at Rocky's, whom the defense suggested was the most likely arsonist. Larson expressed a concern to the court that McGrane might be embarrassed to learn that she was a juror and asked what she should do if other jurors were to question her about McGrane. The court told Larson that McGrane already knew who the jurors were, that embarrassment was not an issue, and that she was not to share any information or opinion about McGrane with the other jurors. The court informed counsel about the conversation, and Larson and the

other alternate juror were discharged from jury service before deliberations began.

The jury convicted Andre Duke on both counts and Claude Duke of conspiracy to commit arson. Both moved for a judgment of acquittal. The district court denied the motion of Andre Duke, but it granted that of Claude Duke on the basis that there was insufficient evidence to support his guilty verdict. The government did not appeal from Claude Duke's judgment of acquittal.

On March 28, 2000, after the time had passed when the government could appeal Claude Duke's acquittal, the district received a letter from him stating that he had set the fire at Rocky's. He said he had been depressed because the bar was not doing well and because he had not told Andre the truth about its precarious financial situation. He stated that he went to Rocky's on the evening of the fire to commit suicide, but "[t]he more I drank the angrier and depressed I got, somehow I thought if I started a small fire in the bar it would sove my problems [sic]." He claimed that he had doused the area with gasoline, tampered with the door to make it appear that there had been a forced entry, and set the fire himself:

> I did this all on my own, my brother Andre knew nothing about what I did. I quite honestly never thought that a jury would find him guilty since he was at home with his girlfriend so how could someone think he did it. I feel bad that my brother and my family have had to go through all of this.

Andre Duke then moved for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, arguing that his brother's letter was newly discovered evidence. He also submitted the transcript of a taped April 2000 conversation in which Claude repeated that he was solely responsible for the fire and that Andre had not been involved in the fire in any way. After a hearing, the district court denied the motion. The court found that Claude's letter and transcribed taped statement were "simply not credible" and rejected them in their entirety. The court concluded that Claude's exculpatory statements did not constitute newly discovered evidence, but that there was no likelihood that they would produce an acquittal in any event. The motion for a new trial for Andre Duke was denied.

Duke appeals and argues that the district court erred in denying his motion for a new trial and that he was denied a fair trial by the district court's ex parte communication with alternate juror Larson at trial. The United States

responds that the district court did not abuse its discretion in denying the Rule 33 motion or in its communication with Larson at trial.

The denial of a motion for a new trial based on newly discovered evidence will not be reversed absent a clear abuse of discretion. See United States v. Castillo, 171 F.3d 1163, 1167 (8th Cir. 1999) (citations omitted). To justify a new trial on this ground, (1) the evidence must have been discovered after trial; (2) the failure to discover this evidence must not be attributable to a lack of due diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be likely to produce an acquittal if a new trial is granted. See United States v. Ryan, 153 F.3d 708, 713 (8th Cir. 1998) (citations omitted).

The district court denied Andre Duke's new trial motion on the grounds that Claude Duke's statement did not constitute "newly discovered evidence: and that even if it did, "there is no likelihood that the statement...would result in acquittal of Andrew Duke." After carefully examining the record, we agree with the district court's conclusions. Both the timing and the nature of the statements render them of dubious credibility. For nearly seven years, Claude Duke

had steadfastly denied that Rocky's was suffering financial difficulties or that he had been involved in any way in the crime. He did not take responsibility for the fire until after the time had passed for the government to appeal his acquittal. The district court did not err in finding that Claude's statements attempting to exonerate his brother were not credible, coming as they did after he had been acquitted and had relatively little to lose by accepting full responsibility for the fire, and that they were therefore not newly discovered evidence.

Duke also did not establish that his brother's recantation would probably have resulted in acquittal on retrial. "Confessions given only after the confessor's conviction, and especially when proffered by relatives or friends, are engulfed in an 'aura of suspicion and doubt.'" United States v. Kamel, 965 F.2d 484, 494 (7th Cir. 1992)(citations omitted). Such statements are of limited probative value and are unlikely to lead to an acquittal. In this case, a second jury would likely view Claude's statements "as nothing more than brotherly loyalty, with [Claude] taking full blame for a crime which he, as well as his brother, has already been convicted." Id. at 494-95. A jury's suspicions would also be aroused by the fact that

Cluade did not confess until the government's time to appeal his acquittal had elapsed and he was no longer subject to a second prosecution. Furthermore, there was much evidence tying Andre Duke to the crime. In short, the trial court did not abuse its discretion in finding that Cluade's testimony was not credible and that his statement was unlikely to produce an acquittal in the event of a new trial.

Andre Duke next contends that the colloquy between the district court and alternate juror Larson "may have been an impermissible ex parte communication which prejudiced Appellant's right to a fair trial." A trial court has leeway in its trial management "to question a juror whose qualifications have been called into doubt...in order to resolve such matters as they arise and ensure an impartial and competent jury." United States v. Campell, 845 F.2d 782, 785 (8th Cir. 1988). "[R]ulings on the qualifications of jurors will not be disturbed 'absent a clear showing of abuse of the sound discretion vested in the district court.'" Id. (citations omitted). Moreover, it cannot be said that Duke was prejudiced by the conversation. Nothing inappropriate has been shown about the court's meeting with Larson, and it appears Andre Duke did not make an issue of it at trial. Furthermore, Larson wsa dismissed before deliberations

began. The court's conversation with the alternate juror did not prejudice Andre Duke's right to a fair trial.

For the reasons stated above, we affirm the judgment of the district court and the order denying a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v. Criminal No. 99-198 (DWF/AJB)

Andre Quinn Duke,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW, ORDER, AND MEMORANDUM DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

Michael W. Ward, Assistant United States Attorney, 600 United States Courthouse, 300 Fourth Street South, Minneapolis, MN 55415, counsel for Plaintiff.

Arthur R. Martínez, Esq., Martinez Law Office, 301 Fourth Avenue South, Suite 377, Minneapolis, MN 55415, counsel for Defendant Andre Quinn Duke.

The above entitled matter is before the Court on Defendant Andre Duke's motion for a new trial based upon his assertion that there is newly discovered evidence. The newly discovered evidence asserted by the Defendant is a letter to the Court, dated March 28, 2000, signed by Claude Duke, Jr. and a taped statement – which has been transcribed – made by Claude Duke, Jr., on April 11, 2000, in the law

offices of Arthur R. Martinez, current counsel for Defendant Andre Duke. The motion is opposed by the government.

Based upon the submissions and arguments of counsel, and the Court having reviewed the contents of the file in this matter and being otherwise duly advised in the premises, the Court hereby makes the following:

FINDINGS OF FACT

1. That Defendant Andre Quinn Duke ("Andre Duke") and then Co-Defendant Claude Eugene Duke, Jr., ("Claude Duke, Jr.") were jointly indicted and tried together.

2. That Defendant Andre Duke and then Co-Defendant Claude Duke, Jr. are brothers.

3. At trial, both Defendants were convicted by jury verdict. Defendant Andre Duke was convicted of Count 1, the offense of arson while aiding and abetting with Claude Duke, Jr., and others unknown to the grand jury. Andre Duke was also convicted of Count 2 – conspiracy to commit arson. Then Defendant Claude Duke, Jr. was acquitted of Count 1 – aiding and abetting arson, and was found guilty of conspiracy to commit arson.

4. That both Defendants previously moved the Court for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure and. Alternatively, for a new

trial. The Court denied both motions of Defendant Andre Duke. The Court granted then-Defendant Claude Duke, Jr.'s motion for a judgment of acquittal as to Count 2, the jury having acquitted Claude Duke, Jr., of Count 1.

5. That Andre Duke testified on his own behalf at the trial. That Claude Duke, Jr. did not testify at trial.

6. That the fire at Rocky's on Tenth in St. Paul, Minnesota, the subject of the arson prosecution, occurred on May 24, 1993.

7. From May 1993 through February 7, 2000, both Defendants denied their guilt in the arson fire. As noted above, on February 8, 2000, the Court set aside the jury's December 1999 verdict, finding Claude Duke, Jr. guilty of conspiring with Andre Duke to commit the arson.

8. That in March 2000, the 30-day period during which time the government could appeal the Court's ruling with respect to the judgment of acquittal of Claude Duke, Jr. expired. That shortly thereafter, the Court received a letter from Claude Duke, Jr. stating that he in all respects was responsible for the arson, from beginning to end. Furthermore, the letter stated that Andre Duke was in no way responsible for the fire and, moreover, that Andre Duke was

entirely unaware of who was responsible for the fire until Claude Duke, Jr. confessed via the March 2000 letter.

9. That the Court has carefully scrutinized all the evidence in the case. The Court has considered the circumstantial inferences to be drawn from the timing of the letter that the Court received; the exculpatory nature of the letter; the fact that Claude Duke, Jr. is alleging that for over seven years he concealed from, lied to, and otherwise deceived his brother into believing that someone other than Claude Duke, Jr. set the fire, and the fact that Claude Duke, Jr. is alleging that he continued to conceal his involvement from Andre Duke throughout the trial process, only accepting blame after all appeal times had run as to Claude Duke, jr. In light of those considerations, the Court finds and concludes that the letter and assertions of Claude Duke, Jr., accepting all responsibility for the fire and alleging that he hid his involvement from his brother for over seventh years, is simply not credible. The Court rejects the letter in its entirety.

10. That Claude Duke, Jr.'s veracity is suspect not only because the time to appeal his acquittal has expired but also because, quite tragically, Claude Duke Jr. is HIV positive and considers himself to be dying of AIDS. In fact, Andre

Duke's lawyer represented at the motion hearing that if a new trial was granted, a deposition may have to be taken of Claude Duke Jr. to protect against the possibility that he might succumb to his illness before a new trial might occur.

11. That, while Claude Duke, Jr.'s intention in seeking to exculpate his brother may be noble, neither the statement contained in the letter sent to the Court not the transcriber taped statement is credible.

12. That Andre Duke received a fair trial.

13. That may conclusion of law which may be deemed a finding of fact is incorporated herein as such.

Based upon the above findings of fact, the Court now makes its:

CONCLUSIONS OF LAW

1. That the statement given by Claude Duke, Jr. exculpating his brother, does not constitute newly discovered evidence.

2. That even assuming the statement constitutes newly discovered evidence, the Court concludes that there is no likelihood ttat such evidence would produce an acquittal.

3 That the Defendant Andre Duke is not entitled to a new trial.

4. That any finding of fact which may be deemed a conclusion of law is incorporated herein as such.

Based upon the above findings of fact and conclusions of law, the Court enters the following:

ORDER

That the motion of Defendant Andre Quinn Duke for a new trial is hereby **DENIED.**

Dated: May 1, 2000

/s/
DONOVAN W. FRANK
Judge of United States District Court

MEMORANDUM

Based upon the totality of the circumstances before the Court and the procedural history of this case; the evidence presented at trial; the relationship of Claude Duke, Jr. and Andre Duke; the timing of the exculpatory statement given by Claude Duke, Jr.; the substance of the statement itself; and Claude Duke, Jr.'s medical condition, the Court finds no credibility whatsoever to Claude Duke, Jr.'s attempt to now take the blame for the trial and exculpate his brother Andre Drake.

While this Court has the utmost respect for Mr. Martinez and does not mean to suggest that Mr. Garcia and Mr. Martinez have not in good faith brought these motions

before the Court, based upon the entire record before the Court, the Court entirely rejects the notion that there is any credibility to this statement. Furthermore, there is no likelihood that such testimony, even if given at a new trial, would result in an acquittal. Ironically, and perhaps tragically, the statement, if anything, confirms the theory of the government's case.

Claude Duke, Jr. is not just asking this Court to find that his statement is credible and that it would likely result in an acquittal should a new trial be granted, but he is asking this Court to accept as credible his assertion that he concealed his involvement and lied to his brother for over seven years. That is an assertion that lacks any credibility based upon the record before the Court. The fact of the matter is that the mental and emotional condition that Claude Duke, Jr. indicates that he suffers from would have motivated Mr. Duke to come forward long ago if there was any truth whatsoever to what he is saying. Given the evidence before the Court, there is little, if any, likelihood that Claude Duke, Jr. would have subjected his brother to a trial if indeed what he is saying now is true.

The evidence at trial entirely belies the position that Claude Duke, Jr. is taking at the present time. The

Memorandum Opinion and Order that this Court filed when it granted the motion for judgment of acquittal on Count 2 with respect to Claude Duke, Jr., which was the only count on which a guilty verdict was returned as relates to Claude Duke, Jr., did not require this Court to find that Claude Duke, Jr. was not involved in the fire with his brother, but rather, that there was insufficient evidence to support the verdict that the jury reached.

Defendant Andre Duke received a fair trial, and Claude Duke, Jr.'s incredible attempt to exculpate his brother is insufficient to justify a new trial.

For the reasons stated, the Court has concluded that there is no likelihood that the statement of Claude Duke, Jr. would result in acquittal of Andre Duke. Therefore, the Defendant's motion is denied. In light of the Court ruling, the case will now proceed on to sentencing.

United States District Court

District of Minnesota

UNITED STATES OF AMERICA JUDGMENT IN A

v. CRIMINAL CASE

ANDRE QUINN DUKE (For Offenses Committed On or After November 1, 1987)

Case Number: 99-198(01(DWF/AJB)

Arthur Martinez

Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s):___.

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[√] was found guilty on count(s) one and two of a two count indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), which invoke the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Number(s)
18 U.S.C. §§2 and 844(i)	Arson	5/24/93	1

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 472-92-8117

Defendant's Date of Birth: 8/3/63

Defendant's USM No.: 08974-041

Defendant's Residence Address:

6400 Hampshire Place North
Golden Valley, MN 55427

Defendant's Mailing Address:

6400 Hampshire Place North
Golden Valley, MN 55427

May 31, 2000

Date of Imposition of Judgment

/s/
Signature of Judicial Officer

DONOVAN W. FRANK, U.S. Judge
Name & Title of Judicial Officer

June 27, 2000
Date

CASE NUMBER: 99-198(01(DWF/AJB)

DEFENDANT: ANDRE QUINN DUKE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

This term consists of 24 months on each of Counts 1 and 2, to be served concurrently.

[√] The court makes the following recommendations to the Bureau of Prisons:

1. Defendant to be confined in the State of Minnesota.
2. Defendant be allowed to participate in the 500 hour comprehensive drug/alcohol treatment program offered by the Bureau of Prisons.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___ .

[ ] as notified by the United States Marshal.

[√] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[√] before 2:00 P.M., on Friday, July 7, 2000. If no institution has been designated, defendant shall surrender

to the U.S. Marshal in Minneapolis, MN by that time and date.

[ ] as notified by the United States Marshal.

[√] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____

to _____ at _____ with a certified of this judgment.

_____

United States Marshal

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

The defendant shall report to the probation officer in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[√] The defendant shall not possess a firearm as defined in 18 U.S.C. §921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth

below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any perons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a low enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program for drug abuse at the direction of the probation officer. That program

may include testing and inpatient or outpatient treatment, counseling or a support group.

2. The defendant shall provide the probation officer access to any requested financial information.

3. The defendant shall pay any restitution that remains unpaid at the commencement of the term of supervised release.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	WAIVED	$ 86,591.99

[ ] If applicable, restitution amount ordered pursuant to plea agreement.....$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ ___.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may

be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[√] The court modifies or waives interest on restitution as follows:

1. Interest on the restitution is waived.

[√] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified other wise in the priority order of percentage payment column below.

**Findings for the total amount of losses are required under Chapter 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994.

Name of Payee	Amount of Restitution Ordered	Priority Order or % of Pymnt
Century Surety Group Suite 290 2400 Corporate Exchange Drive Columbus, Ohio 43231	$24,920.16	
CNA P.O. Box 419375 Kansas City, Missouri 64141-6375	$61,671.83	
TOTALS:	$86,591.99	$___

**Findings for the total amount of losses are required under Chapters 103A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [√] in full immediately; or

B [ ] __ immediately; balance due (in accordance with C, D, or E); or

C [ ] not later than ___; or

D [ ] in installments to commence __ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] In __ (e.g. equal, weekly, monthly, quarterly) installments of $__ over a period of __ years(s) to commence __ day (s) after the date of this judgment.

Special Instructions regarding the payment of criminal monetary penalties:

Payments are to be made payable to the Clerk, U.S. District Court, for disbursement to the victim.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[√] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guidline Range Determined by the Court:

Total Offense Level: 22

Criminal History Category: I

Imprisonment Range: 41 to 51 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 7,500.00 to $ 75,000.00

[√] Fine is waived or is below the guideline range, because of inability to pay.

Total amount of Restitution: $ 86,591.99

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no

reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[√] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[√] for the following specific reason(s):

- Defendant's motion for downward departure pursuant to 5K2.0 – GRANTED

- The Court grants Defendant's motion to depart pursuant to 5K2 based upon the following factors:

- The Defendant's lack of criminal record, given the length of investigation of this case, namely seven years, and the length of time since the arson;

- The Defendant lost his job with the United States Postal Service as a direct result of this conviction;

- The record establishes the significant role of the Defendant as a good parent and role model for four children, ages 10, 6, 5, and 2;

- The record establishes a significant supporting role of the Defendant to extended family members in addressing the medical needs of the family;
- A departure to two years would be consistent with similarly situated defendants, given the minimal damage in the case and the fact that no personal injury occurred;
- Significantly, the Defendant has played a significant role in supporting his brother who is suffering from the HIV virus;
- An incarceration period of more than two years would significantly and detrimentally impact the immediate family of the Defendant and serve no additional sentencing purpose;
- The two years is deemed fair and appropriate for the reasons stated by the Court.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer, or the United States Attorney.